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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JAMES R. HOFFA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY BRIEF FOR PETITIONER AND MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

The Government's Brief in Opposition, whether designedly or not, is seriously inaccurate and misleading as to both the facts of record and our legal contentions in this proceeding. We set forth here, and only as examples, some of the more glaring distortions and evasions in the Government's brief.

1. *Deprivation of fair trial by use of the testimony of Government spy Partin.*—Our argument does not rest, as the Government asserts (Opp. 14), on "the erroneous factual assumption" that Partin was "planted" in petitioner's councils of the Test Fleet de-

fense. In fact, the record shows rather plainly that Partin was so planted. See the facts buried in footnote 4, Opp. 5 and the fuller uncontradicted statement in Pet. 8-16. However, it is irrelevant to the constitutional questions presented whether Partin's spying was originally instigated by the Department of Justice, the State of Louisiana, motivations of his own, or a combination of the three. What matters is that Partin admittedly spied on the Test Fleet defense for and at the request of the Department of Justice, reporting daily, and sometimes more frequently, to the prosecution (Pet. 10-13). It was the fact of this spying by a prosecution agent, regardless of its origin, which invaded the constitutional rights of the petitioner.

Also irrelevant is the Government's contention that Partin testified only to remarks by petitioner "unrelated to trial strategy" and was instructed by the Department to report only on "jury tampering or other unlawful activities" (Opp. 15)—an instruction which was admittedly breached without remonstrance by the Department (Pet. 13). The fact remains that despite the alleged instruction, Partin did spy for, and reported to the Government on "trial strategy" and defense activities (Pet. 13). This role tainted *all* his observations and testimony in the Chattanooga trial. It is unrealistic and unworkable to attempt to fragment the evidence obtained from his illegal, unified role into tainted and untainted categories (see Pet. 49, 51, 52).

Once it is appreciated that Partin's role was an interference with petitioner's constitutional rights, the question which remains is the nature and extent of the remedy. On this point the constitutional issues are manifestly substantial (Pet. 46-52) and are intimately

related to the fair administration of justice in the federal courts.[1]

2. *Deprivation of fair trial by prejudicial publicity.*—Petitioner's contention is not, as the Government says (Opp. 31) that a "notorious public figure who has been criticized in media of mass communication may never be tried on a criminal charge." On the contrary, the petitioner's argument is that a "notorious public figure," no less than the ordinary citizen, is entitled to be tried in an atmosphere free from prejudicial publicity.

The Government seeks to minimize the Chattanooga publicity both as to the content and time relationship to the trial. The Government does not, of course, claim that the transfer of the trial from Nashville to Chattanooga satisfied the requirement of a fair trial if the publicity in Chattanooga at the time of trial was as prejudicial as that in Nashville which required the transfer. The Government's basic contention, therefore, is that the publicity in Chattanooga was "far less extensive than that in Nashville" (Opp. 30). The facts concerning the publicity, however, are to the contrary and are determinedly ignored by the Government. See App. D. of Petition, 63a-71a, setting forth the publicity in Chattanooga immediately prior to the trial, including the news items and editorials in the Chattanooga newspapers during the two months immediately preceding the trial. See also Pet. 17-26.

According to the Government: "the lapse of two months between the disbarment of Hoffa's attorney

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[1] The Government cites *Lopez* v. *United States*, 373 U.S. 427 as squarely rejecting our claim that Partin's espionage was a violation of the 4th Amendment. The case is obviously inapplicable.

(which was reported on the front page of the *Chattanooga Times* of November 21 and 22, 1963) and the commencement of the trial was sufficient to dissipate any alleged prejudice arising out of that incident." (Opp. 30).

This implicit acknowledgement of prejudice and attempt to minimize it completely ignores the events subsequent to the disbarment, such as the reconvening of the Grand Jury to investigate Osborn's alleged jury tampering, the calling before the Grand Jury of jurors from the Test Fleet case, and Osborn's indictment for jury tampering, all of which were copiously reported shortly before the trial (Pet. 19, 22, Appendix D). In all of this publicity, Osborn was repeatedly identified with petitioner, who was continuously and publicly linked with Osborn's activities.

The Government also seeks to slough off the culpability of the Department of Justice in releasing summaries of prior criminal proceedings against the petitioner at the time of the instant indictment by tucking its answer away in a footnote and pleading that the release date was more than seven months before trial (Opp. 32, fn. 20). If constitutional rights are to be measured in terms of thirty day periods, the short answer is that a front page news story in the Chattanooga Times of December 6, 1963, approximately one month before trial, reiterates the substance of the Department of Justice releases set forth in Appendices E1 and E2 (See Pet. App. D at p. 67a).

3. *Deprivation of fair trial by the Government's surveillance.*—One is led to believe from the Government's brief (pp. 43-45) that petitioner is asking this Court to review adverse factual findings by the Court

below. Yet it is plain for all who care to read that our legal arguments on surveillance are based exclusively on the *facts admitted by the Government* in the trial court hearing on surveillance. No factual dispute is involved. See Pet. 29-32.

4. *Deprivation of fair trial by admission and retention of the Tippens-Medlin evidence.*—A serious question here is whether petitioner was entitled to *confront Medlin* and cross-examine him on his statements to venireman Tippens. In the belief that he was so entitled, petitioner successfully objected to testimony by Tippens as to Medlin's statements. To urge, as does the Government (Opp. 34), that petitioner's successful objection disqualified him from cross-examining *Tippens* obfuscates the basic question of petitioner's rights to confront and cross-examine *Medlin.*

The Government defends the refusal to strike the Tippens evidence despite petitioner's acquittal on the Tippens-Medlin count by urging that the evidence was admitted only to corroborate Partin's testimony (Opp. 36). But it is incompatible with due process and the prohibition of double jeopardy to use for any purpose evidence of the alleged commission of an offense of which the accused has been found not guilty (Pet. 69). Moreover, the prosecution's summation exploited the evidence as direct proof of guilt and not merely as corroborating Partin's testimony (Pet. 35).

5. *The Grand Jury selection.*—In defending the suggestor system the Government relies on the alleged personal knowledge of the jury commission regarding the qualifications of the individual jurors and the fidelity of the suggestors to the trust imposed on them by the jury commission. But the issues here are

whether petitioner was erroneously denied an opportunity to prove (1) that the Clerk and Jury Commissioner had improperly delegated their duties to the suggestors and (2) that there was a systematic exclusion of Negroes, Catholics, Jews, manual workers and union members. The Government completely ignores the second issue (discussed Pet. 73-74), and, in disregard of the fact that petitioner was precluded from introducing evidence on the subject, confuses the first by representing that the evidence does not show improper delegation (Opp. 18).

Moreover, the Government's claim on its face is without substance. It is beside the point that the Jury Commissioner and the Clerk gave general instructions to the suggestors and added some names of their own (Opp. 18). What is undeniable is that the Clerk and the Commissioner never supervised or reviewed the suggestors' choices so as to insure that the instructions were complied with. And petitioner's prima facie showing of exclusions of discrete, non-elite groups amply demonstrated the need for a hearing to determine whether there had been a discriminatory selection of the Grand Jury.

6. *Lack of probable cause for indictment.*—The Government (Opp. 3) states the question presented as: "Whether petitioner Hoffa's indictment was invalid because it was based solely on hearsay evidence." That question was authoritatively answered by *Costello.* This, of course, we recognize. However, the question actually presented here is (Pet. 4): "Whether a Government agent's hearsay testimony of the alleged knowledge of a grand jury witness, who refuses to testify on the claim of Fifth Amendment privilege,

constitutes probable cause for indictment." That question presents considerations quite different from those before the Court in *Costello*. (see Pet. 77-78).

7. *Abandonment to the jury of trial judge's function of determining the existence of aliunde evidence of conspiracy.*—The Court below recognized that the trial judge submitted the issue of aliunde evidence to the jury (Pet. App. A, p. 33a). The Government, ignoring that recognition, rashly asserts that the contrary is "obvious" (Opp. 37).

8. *The Prosecutors' summation to the jury.*—(a) The Prosecutors repeatedly invited the jury to infer guilt from petitioner's participation in the conduct of his trials. The Government misleadingly justifies these invitations on the ground that the prosecutors were merely referring to petitioner's "courtroom demeanor" (Opp. 50). The comments were that petitioner "pass[ed] up questions to his attorneys," "review[ed] the documents that come in here in evidence," "was closeted on many occasions with his attorneys in Nashville," and "was reading every page of the transcript." (Pet. 44-45).

These were references to the fact that petitioner participated in his trials, not to his demeanor. If an accused takes the stand, the prosecutor may comment adversely on the way he answered questions (his "demeanor"), but he may not ask the jury to infer guilt from the fact that the defendant exercised his constitutional right to testify, any more than he may make such a comment on a defendant's exercise of his right not to testify. Yet the right of an accused to partici-

pate in his trial has an equally protected constitutional status. (See Pet. 80-81).

(b) Confirming our representation (Pet. 81-82) of a conflict among the Circuits on the permissibility of a prosecutor's expressing to the jury a personal belief in the guilt of the accused, the Government cites cases for the position of some of the Circuit Courts, contrary to others, that such statements are not improper "so long as the belief was based on the evidence introduced." (Opp. 50, fn. 34). Of course, in this case, the prosecutor stated his personal belief without indicating in the slightest whether it derived from the record or from "other evidence unknown to the jury," and he staked this assertion on his prestige as a Tennessee lawyer.

The Government's conduct cannot be justified as a retaliation to defense summations attacking "the personal integrity of Government counsel" (Opp. 51). The defense comments referred to, though heated, did not express counsel's personal belief in the innocence of the accused, they were made as inferences from matters of record, and though uncomplimentary to certain officers in the Department of Justice, did not attack trial counsel (G. App. 267b-270b, 284b-285b, 291b-292b).

The foregoing examples suffice to indicate the Government's methods. By those methods, important questions of constitutional right, premised on undisputed facts, are transformed into disputes on the facts; and, generally, a Government presentation results which hardly resembles the case actually before the Court. In reply, we stand upon our petition. It ac-

curately states the case and endeavors to discuss the issues with intellectual honesty.

Respectfully submitted,

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MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

Comes now the petitioner, James R. Hoffa, by his counsel, and respectfully moves the Court to defer consideration of the petition for certiorari pending application to this Court by the Government or petitioner for certiorari to such decision as the Court of Appeals for the Sixth Circuit makes in *United States* v. *James R. Hoffa,* No. 16,567. The following facts and reasons are set forth in support of this motion:

1. The first question presented in the petition for certiorari is whether the evidence allegedly obtained

by one Partin, a Government spy in the defense councils in the Test Fleet case, was validly used against petitioner in his trial in the instant case.

2. The appeal now pending in No. 16,567 before the Sixth Circuit Court of Appeals presents the question whether the conviction in the present proceeding can constitutionally stand in view of the admitted fact that the Government had still another spy, one Vick, in the midst of defense councils *in this very proceeding*—a Government spy, who like Partin, reported defense strategy to the Government.

3. Question Number 1 presented by the petition for certiorari, and the question pending for decision by the Sixth Circuit in No. 16,567 are thus clearly related. They are the two aspects of an invasion of petitioner's Fourth, Fifth and Sixth Amendment rights by the same set of Government officials. Appropriately, they should be considered together; unless Number 16,567 is decided by the Court of Appeals in petitioner's favor, and the Government does not apply for certiorari. In that latter event, the necessity for decision on the petition for certiorari would be obviated.

4. In the following paragraphs, we summarize the Government's invasion via Vick of the petitioner's Fourth, Fifth and Sixth Amendment rights in this proceeding.

5. Thomas Osborn was the attorney for petitioner Hoffa in the defense of the Test Fleet case, and in the defense of the instant case from August 29, 1962, until November 19, 1963. The grand jury was impaneled in this case in January, 1963. The indictment was returned on May 9, 1963.

6. In connection with services as trial attorney in both cases, Osborn employed Vick as a confidential investigator during the period from October, 1962 until November 8, 1963.

7. In preparation for trial in this very case, Osborn's office was the clearinghouse for all memoranda, motions, briefs, statements of witnesses, and other written material assembled and being assembled by Osborn and other attorneys representing co-defendants. Vick had access to this information. He could come and go freely, talking to office secretaries and associates. He had—with others—use of a small office in which memoranda and other papers were kept after copying for use as needed.

8. Vick was present when other investigators working for Osborn dictated reports to secretaries furnished by him and had general access to the information developed by the other investigators with respect to various phases of defense planning in this very case.

9. Vick was also present on occasions when Osborn met with the attorneys for the co-defendants for the purpose of planning of legal strategy, listing of witnesses who would be called on preliminary motions, and the nature of the testimony of such witnesses in this very case.

10. Both before and after the indictment of petitioner in this very case on May 9, 1963, Osborn had frequent telephonic communications with him, as well as with the attorneys for his co-defendants in which were discussed confidential matters relating to the defense and communications between the attorneys for the other defendants and Osborn. Osborn trusted Vick

to keep confidential whatever information he derived from communications he may have overheard or information which was available in Osborn's office; and also to keep confidential the information Osborn gave him as to the reasons for conducting the investigations ordered by him.

11. In January, 1963, Judge William E. Miller impaneled a grand jury for an investigation of alleged jury fixing in connection with the Test Fleet case. From the *ex parte* disclosures before Judge Miller, it was apparent to Osborn that the inquiry would be directed against petitioner Hoffa. It was about this time that an FBI agent named Hillen told Vick he would like to hear "any violations of law."

12. Vick was employed by Osborn to investigate the grand jury panel in this case for the purpose of ascertaining whether they were qualified grand jurors, whether any of the jurors had any bias against Hoffa, and whether the panel contained a cross-section of the community. Osborn also asked Vick to conduct or take part in three or four specialized investigations.

13. Vick continued his work until late in August, 1963, when Vick told Osborn that he was under pressure from Walter Sheridan, administrative assistant to the then-Attorney General, who was in charge of the Hoffa prosecution, not to do any further work for Osborn.

14. On October 28, 1963, Vick came back to Osborn and asked for further work and Osborn gave him work to do in connection with the investigation of the petit jury panel which had been drawn in September, 1963, and which might have tried the present case.

15. Osborn was brought to trial on May 25, 1964, on charges based on the testimony given by Vick. Osborn

learned for the first time at the conclusion of the direct examination of Vick, when certain statements were made available to him and his attorney under the Jencks Act, that Vick had been reporting to the Federal Bureau of Investigation or Sheridan, or both, as early as February, 1963, regarding Osborn's activities on behalf of petitioner in this very case.

16. Sheridan admitted in his testimony in Osborn's trial that he knew Vick and that he first met him sometime in July or August, 1963; that he knew that Vick was investigating for Mr. Osborn and knew that he had investigated for Mr. Osborn in the Test Fleet case. Sheridan told Vick that if in the course of his work for petitioner's counsel in this case, he became aware of any information concerning any illegal activities that "I would like him to represent me."

17. Sheridan's notes of his conversations with Vick showed that Vick had informed Sheridan of: (1) discussions with prospective counsel for a co-defendant; (2) a proposed defense to Count One of the indictment; (3) the names and activities of other investigators who were employed by Osborn; (4) a background investigation being made for cross-examination of a prospective Government witness; (5) an investigation being made to determine whether the Jury Commission was properly constituted; and (6) an investigation being made of alleged misconduct of the foreman of the grand jury which indicted the petitioner. All of the foregoing related to defense strategy in this case.

18. Sheridan admitted that the notes of the Vick conversations were made by him, but sought to explain them as information properly obtained in seeking information of "illegal" activities.

19. Vick also made periodic reports to the FBI on his activities as an investigator for petitioner's defense, prior to and after indictment in this case. The FBI turned over their reports to Sheridan. This is uncontradicted.

20. This motion and a request for a hearing thereon was denied by the trial court.

So that the Court may be fully informed of all related proceedings, we set forth in the Appendix hereto, a statement of a later and different appeal by petitioner to the Sixth Circuit Court of Appeals. That appeal is not relied on as grounds for granting this motion because it involves no issue connected with any question presented in the petition for certiorari.

Respectfully submitted,

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APPENDIX TO MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

On September 1, 1965, petitioner filed a motion for a new trial based on newly discovered evidence. He alleged: (a) prospective jurors, who were ultimately selected and served as jurors, entertained and expressed a bias and hostility against petitioner prior to trial, effectively concealed and failed to disclose such bias and the expression thereof at the voir dire, expressed hostility and bias against petitioner during the course of the trial, and one of such jurors reaffirmed that his verdict was the result of such bias and hostility; (b) the sequestered jurors, aided, abetted and induced by their custodial marshals, disobeyed the Court's orders to refrain from discussing or deciding the case during trial, and to observe strictly the sequestration admonitions, but, instead, entertained and expressed bias and prejudice toward the defendant; (c) officials of the United States furnished to jurors during the trial, prostitutes, alcohol and other entertainment, which had the tendency and effect of influencing the jurors in favor of the Government and against the petitioner, and that said officials made remarks to the jurors which were prejudicial to the petitioner; (d) the trial judge, outside of court and during the course of the trial, expressed hostility and bias toward the petitioner; and (e) that the trial judge was disqualified from passing upon the motion under Title 18, U.S.C.A., Secs. 144 and 455.

In support of the motion, petitioner filed affidavits of six co-workers of juror Starnes. They swore that prior to the trial, Starnes stated that if he got on the jury, he would convict Hoffa; that Starnes was known to be biased against unions; that juror Kilgore made a like statement before the trial; and that after the trial, Kilgore reaffirmed by statements his pretrial bias and intention to convict Hoffa.

In further support of the motion, the petitioner filed other affidavits setting forth the following:

Bellboy Culpepper further stated that he sent prostitutes "Marie" and "Bobbie" to rooms in the Read House, where the jury was sequestered, but did not identify any individuals.

Bobbie Ann Sells, a prostitute, stated that during the trial she was called by one Ezell, whom she knew as a Read House bellboy. He arranged for her to meet Deputy Marshal Kemp, who was assigned to the jury which was sequestered on the tenth floor. Thereafter, Marshal Kemp took her to the tenth floor many times where she had sexual intercourse with jurors Link, Kilgore, Case, Burrows and Curbow. For each such act, she was paid $20.00 by Ezell, who said he got it from the marshals.

Kemp instructed her not to tell about these acts and, if discovered, to say she was a lady marshal. The jurors and marshals were frequently drinking (except Starnes) and she attended two cocktail parties in the jurors' recreation room in the hotel, one after the verdict. On one occasion, she saw a marshal running down the hall dressed only in a woman's bra and panties.

She saw other girls in the jurors' quarters, including one she knew as Patsy Jo Harris.

Patsy Jo Harris, another prostitute, swore that during the trial, bellboy Seymour arranged for her to meet Marshal Kemp at the hotel. Kemp gave her the same instructions as he had given to Bobbie Ann Sells. Patsy Jo Harris had sexual intercourse with jurors Starnes, Link, Bonner and Curbow on the tenth floor of the Read House. She, too, was paid $20.00 for each act by the bellboy, who said he got it from the marshals.

All, except juror Starnes, drank heavily. She also saw the marshall in a woman's bra and panties.

In addition, she attended a party at the Alamo Plaza Motel where the marshals stayed. Jurors Link and Curbow were there, drunk. During the night, she had sexual intercourse with both of them.

Troyce Dean Henry swore that during the trial she met Deputy Marshal Richard Reidy at the VFW Club in Chattanooga, and she was with him almost every night thereafter. Through him, she met other marshals, and was in an automobile accident with Deputy Marshals Carpenter and Whitmore. She attended many parties, both at the Read House Hotel and the Alamo Plaza Motel. She saw juror Curbow, both at the Alamo Plaza Motel and the Veterans of Foreign Wars Club. She saw call girls and heavy drinking, both at the Read House Hotel and the Alamo Plaza Motel. She also observed Deputy Marshal Reidy in a woman's bra and panties, as she attended the post-verdict celebration party at the Read House.

All of these women affiants swore that prejudicial and biased statements directed against petitioner were made by jurors, or marshals in the presence of jurors. Patsy Jo Harris swore that a marshal stated in the presence of jurors that they had the "cocky, little bastard now, right where we want him." Troyce Dean Henry stated that she heard the marshals make many disparaging remarks about petitioner. Bobbie Ann Sells swore that she heard juror Link state that "we have two Jews, two colored fellows and Hoffa in a pot and we're going to set fire to them," and further heard a marshal say in the presence of jurors that "we have the cocky, little bastard and we're going to convict him."

Juror Kilgore stated to Marie Monday that they were going to convict petitioner. Juror McConnell told her that the jurors had already decided to convict Hoffa. Other jurors talked to her about the case.

The furnishing of whisky and women to the jurors by the marshals during the trial was *admitted* by juror Kilgore to his fellow employees after the trial.

On voir dire all of the jurors denied they had any prejudice against petitioner, or had formed or expressed any opinion on his innocence or guilt.

All of the jurors, except one whom the Government alleged was ill, and 59 deputy marshals, filed affidavits denying the foregoing sworn statements.

Petitioner also filed on September 1, 1965 an affidavit of disqualification of the presiding judge based on alleged prejudicial statements against petitioner made by the judge outside the courtroom. In an opinion dated September 22, 1965, the court granted the Government's motion to strike the affidavit of bias and prejudice, labeling the sworn statement before him as "patent perjury."

Because the statements in the affidavit of bias and prejudice, which were labeled "patent perjury" by the court, were substantially identical with sworn statements set forth in the motion for new trial alleging misconduct of the trial judge, the petitioner on September 27, 1965 filed a motion to disqualify the trial judge under Title 28, U.S. Code, Sec. 455. Petitioner contended that in his opinion of September 22, 1965, the trial judge had prejudged the allegations set forth in the motion for a new trial.

The court denied the motion for a new trial; denied a request for a hearing thereon; and denied the two motions to disqualify himself. Petitioner's appeal from these orders is pending in the Sixth Circuit.